

FEBRUARY 7, 1771.

13th Feb 1771sic
7th March
1771.

Unto the Right Honourable the Lords of Council and Session,

T H E

P E T I T I O N

O F

HUGH WOOD Merchant and Factor in
Leith,

Humbly sheweth,

THAT, in December 1768, the ship *Adolphus*, David Ross master, which is constantly employed in the trade between Leith and London, arrived at Leith, with a full cargo of goods on board.

Amongst these goods there happened to be a cask marked, *Dry ware*, addressed, "To William Ogilvie, Esq; near Edinburgh."

Who, or what this William Ogilvie, Esq; was, no body belonging to the ship could say, nor was the gentleman's place of residence pointed out; for the vague direction, "near Edinburgh," which had been put upon the cask by a *London cit*, might import any place east, west, north, or south, lying at no great distance from this capital. A Londoner will address a letter, or a parcel, "*near Edinburgh*," though the place he means be ten, fifteen, or twenty English miles from Edinburgh. There was therefore a large circuit comprehended under this address, "To William Ogilvie, Esq; near Edinburgh;" nor could the designation, *Esq;* be of any service in discovering Mr. Ogilvie, because in truth it is

A

no

no designation at all, as your Lordships have determined, and is now assumed by so many people, that there is hardly any state or profession in which one will not find many *Esquires*.

The aforesaid cask not being called for at the livery of the ship, was, according to the uniform practice in such cases, put into the cellar of your petitioner, a great part of whose business it is to receive goods from ships, and to keep them till an owner appears, when he delivers them up, upon payment of the freight and cellar-rent.

It now appears that this cask contained some bushels of apples, which had been sent to one Mr. Ogilvie, who lives at the back of the Meadow, or Hope-park, not upon his commission, but as a present from his brother, who had not only omitted sending a receipt from the ship-master, which he used to do upon former occasions; but had not even informed him that such a present was sent, till the month of March thereafter, when a person employed by Mr. Ogilvie enquired at your petitioner's cellar, where he found the cask safely lodged in a dry well-aired place. Mr. Ogilvie, however, being resolved to be very sure as to what he was about, took care to have the cask inspected, and perceiving that the apples were rotten, he refused to take them, and would not even pay the freight and cellar-rent, though it was clear that neither Mr. Ross, the ship-master, nor your petitioner, the factor, had acted with regard to this cask in any other way than they constantly do with regard to all goods in the same situation.

Both Mr. Ross and your petitioner were extremely sorry at Mr. Ogilvie's disappointment, for, according to his brother's letter, the apples sent were *the best eating apples*. But it seems Mr. Ogilvie was so much offended that his apples were rotten, through his brother's neglecting to inform him they were sent, and that he himself was not known to every body, that he resolved to have them forced to pay him the value of his brother's present; and for that purpose commenced a process before the sheriff of Edinburgh, against both Mr. Ross and your petitioner, the clamorous terms of which sufficiently speak out the *animus* by which it was urged on; for it set forth, "That several parcels of goods had been shipped for him in the *Adolphus*, at the same time with the cask of apples; that part of the parcels were delivered to Mr. Glass merchant in
" Leith,

"Leith, on his account, and the freight paid therefor." All of which was a mistake in point of fact. But worse remains to be mentioned; for it set forth, "That the greatest part of the apples were *embezzled* and taken out of the cask;" an injurious assertion, totally destitute of truth, and which was hurting your petitioner more than Mr. Ogilvie could be, by the loss of a whole ship-load of apples. It further set forth, "That" the apples were "all of them rotten, fitter for the dunghill than to be made use of for eating."

Your Lordships, however, will please know, that in this libel it was thought necessary that Mr. Ogilvie should give a more special designation of himself than the address upon the cask. Accordingly it bears to be at the instance of "William Ogilvie, Etq; residing at the back of the Meadow."

A proof having been taken, the sheriff, on the 1st of November 1769, gave decret against Mr. Ross and your petitioner, jointly and severally, for the sum of 1 l. 17 s. 6 d. sterling, as the price of the apples, found no freight or cellar-rent due, and decreed against them for the sum of 1 l. 15 s. 2 d. of expences, besides that of extracting the decret. November 1, 1769.

A suspension of this decret came, in course, before Lord Elliock, July 28, ordinary; and his Lordship was pleased, on the 28th of July, 1770, "to repel the reasons of suspension, and find the letters *orderly proceeded*." And, upon the 9th of August, 1770, his Lordship was pleased "to decern for the sum of 2 l. 5 s. sterling of expences, and for the expence of extracting the decret, suspending extract till the 12th of November then next." To which interlocutor his Lordship was pleased to adhere, on the 11th of August and 28th of November, 1770, refusing two representations without answers. July 28, 1770.
August 9, 1770.
August 11, 1770, and
Novemb. 28, 1770.

Mr. Ross and your petitioner reclaimed; and, upon advising their petition, with answers for Mr. Ogilvie, your Lordships were pleased, on the 27th of January, 1771, to pronounce the following interlocutor: "The Lords having advised this petition, with the answers, they turn the decret charged on into a libel, and *affoizlie* David Ross, the shipmaster, from all the conclusions thereof; but find Hugh Wood liable to the pursuer in the sum of 1 l. 17 s. 6 d. sterling, as the price of the apples libelled, and also in the expences of the extract of the decret, as the same shall

"shall be certified by the collector of the clerks dues; but find no other expences due, and decern."

1741.

Your petitioner thus finds himself left alone, and condemned by your Lordships, as having been culpable, when he is conscious to himself that he acted *optima fide*, and according to the universal and established practice. He has been employed in the business of a factor at Leith, ever since the year 1741, and he can say, that, during all that time, he never, before this unlucky cask was put into his cellar, had the least reflexion thrown out against him, or the smallest difference with any one of the numerous owners of goods, which have been in his custody. The cause in which he has now had the misfortune to be cast, is originally, indeed, but of small value; but it is a very important one to your petitioner, and to all who are engaged in the same branch of business. Indeed, your Lordships justly consider every question respecting commerce, to be a question of importance. This is a question in commerce, entirely new, and as the decision given in it may be a precedent in the like cases, and may, in the petitioner's humble apprehension, be either a sanction to, or, in a great measure, cut off that particular business in the department of commerce, in which he has been so long employed, he will be forgiven for bringing the question again under the review of your Lordships.

March 26,
1769.

When the cause was last before your Lordships, it was argued for Mr. Ross, with regard to whom the proof was led, That as the pursuer had deponed. that he received no advice from his brother about the apples till the 26th of March 1769, it could not be believed, that the persons whom he employed made any enquiry about them before that time, and that there was a great uncertainty and discrepancy in the evidence upon that head, though the witnesses seemed very well disposed to fix the time to the month of December, 1768.

But taking the matter according to the pursuer's own showing, how does it come out?

Andrew Gordon, porter in Leith, depones, "That, about the beginning of the year 1769, and the deponent is certain the year 1768 was past, he was desired by Moses Glas to go along with the pursuer's servant to get a cask of apples: That when they went aboard the ship, one of the crew told them, that they
" had

" had apples on board, but they were not come to hand : That
 " they called a second time, and got the same answer ; they also
 " called a third time, and got the same answer."

Zachariah Jones, spouse to Moses Glas, residenter in Leith, de-
 pones, " That, some time in the end of the year 1768, or the be-
 " ginning of the year 1769, the pursuer sent down his servant to
 " the deponent, to get a cask of Apples, which had come from
 " London in a ship : That the deponent sent her daughter, with
 " the said servant, to the harbour of Leith, to enquire after a ship
 " that had come from London ; who, upon their return, told the de-
 " ponent, that the mate of the Adolphus, Captain David Ross ma-
 " ster, had informed them, that the cask of apples was aboard
 " said ship, but that the same was not come to hand ; and that
 " they desired the mate to send them to the deponent's shop. De-
 " pones, that, after this, there were three several messages sent to
 " the said ship, at different times, for the apples, and the answers
 " that were reported to the deponent were, That the apples were
 " not come to hand : That, afterwards, the pursuer himself came
 " down, and asked the deponent if there were any account of the
 " apples : That the deponent told him, Not."

Here then your Lordships see Mr. Ogilvie's consciousness of what
 was incumbent on him. He begins very well, but does not per-
 severe. Take his own story, and he must say, That he was in-
 formed that his apples were on board the *Adolphus*, but were not
 come to hand ; that is to say, were not yet sought out from a-
 mongst the multiplicity of other goods. Why then did he not
 pursue his enquiries ? Why did he not desire the people whom he
 employed at Leith, or his own servant, to call again, and get his
 cask ? Nothing was more easy ; for there is a book kept in every
 ship of the different articles put on board, and, opposite to each
 article, is marked what has become of it. There are but a few
 factors in all Leith ; and it was no great trouble to the pursuer's
 porter or servant to enquire at their cellars for the cask. This was
 surely much more reasonable, than that the petitioner should have
 sent a-hunting after " William Ogilvie, Esq; near Edinburgh ;"
 which the pursuer pretends your petitioner should have done.
 The pursuer, by his repeated messages, took upon himself the care
 of getting account of his apples ; and, if he grew indifferent
 B about

about them, and did not follow forth the means of getting them, he had himself to blame.

It was maintained, That your petitioner should be found liable, upon the principle of law, with regard to a *negotiorum gestor*, who must be liable for neglect. But, with great submission, that principle does not apply to the case in hand; because your petitioner, though no doubt a kind of *negotiorum gestor*, has his precise duty limited and ascertained by constant and universal practice, which, in commercial affairs, is most properly considered as the common law of the country. Your petitioner is just a *custodiar*; his business is to receive goods into his cellar or ware-house, and there keep them safely till they are called for by those to whom they belong.

The doctrine of the civil law, with regard to a *negotiorum gestor*, is: "Nec tantum potest conveniri gestor propter ea, quæ gessit sed et de non gestis, seu neglectis, si modo gerere debuerit. Gerere vero debuit et perficere ea, que inchoavit: nova inchoare non tenetur." Voet. lib. 3. tit 5. § 6.

And Lord Bankton, in his Institutes of the Law of Scotland, lays it down, That "the *negotiorum gestor*, or agent, is not only liable for what he acts, but likewise for his forbearing to act, after he has begun the management; for he is bound, *susceptum perficere munus*, to perfect what he begins, or is conjoined with it; but needs not begin any new business, unless, on his account, another abstains." Book 1. tit. 9. § 26.

By these very principles of law then, let your petitioner be tried. He avers it, and the pursuer cannot contradict it, that universal practice has limited the business of such a factor as your petitioner, merely to keeping the goods in safe custody, he being answerable to the ship-master for their freight, and to the owners of the goods, if by any improper management, any *culpa* upon his part, the goods are damaged or destroyed; but farther than this, he is not bound, nor even intitled to go. He is not to *inchoate a different kind of business*, by searching for the owners of the goods, which would be attended with more expence than his own branch of business, viz. keeping them in safe custody till called for; all that he has for keeping such a cask as this, is only about sixpence a month, and your Lordships know that he could not get a common Leith porter for that money, to go in quest of an unknown owner

owner of goods, or more properly speaking, to go in quest of a person who will answer to a vague and indefinite address.

It has been maintained, that your petitioner should have put an advertisement in the news-papers, and that the expence of doing so, or any other expence he might have incurred in making inquiries after the owner of the cask, would have been re-paid him.

It is easy to argue in this manner, upon a general view; and your petitioner is not surpris'd, that your Lordships, whose attention is taken up with so many large and extensive subjects, should overlook the little particulars which must occur innumerable times in the business of such a factor as your petitioner.

A factor such as your petitioner, cannot know one half of the people whose goods are put into his custody; must he then hunt out every one of these people in every corner? were that to be the case, he must have more messengers kept in constant pay, than what would exhaust a great deal more than all his profits. And suppose he was to advertise in the news-papers; your Lordships know that there are published in this city, four news-papers, viz. the Caledonian Mercury, the Edinburgh Evening Courant, the Edinburgh Advertiser, and the Edinburgh Weekly Journal; as he cannot tell which of these papers is taken in by the unknown owner of the goods, he must advertise in every one of them, and each advertisement, for the first time of its being inserted, costs three shillings and sixpence; so that supposing him to advertise only once in the Edinburgh news-papers, he lays out no less than fourteen shillings sterling, a sum, which the petitioner will be forgiven to say, will exceed the value of many articles which are put into his custody; and the truth is, that there are many people, who, if they knew that a small article sent to them by a friend in London, was burdened with an expence of seeking out the owner, above, or even half, its value, they would very sagaciously ly snug, and never acknowledge it. Instances of this have often occurred, when people have suspected that stupid pamphlets, or absurd letters, have been sent to them by post; and the same thing will happen, when people suspect that goods, too dear of the carriage, are lying for them, ready to be relieved.

Now,

Now, what a prodigious additional tax must there be brought upon goods which come from London to Leith, if it shall be understood, that the factor, the *custodiar*, must take upon him the business of seeking out the owners, and spare no expence in his inquiries.

And when are these inquiries to be made? Or how long is the factor to wait, before he lays out any money in that way? It was said that your petitioner was particularly to be blamed for delay in this case, because his very nose would tell him that the cask contained apples, which, after a voyage from London to Leith, could not but have a very strong smell. The petitioner begs leave, however, to inform your Lordships, that in the hurry of unloading a vessel, and carrying goods into a factor's cellar, the people who are employed, seldom give much attention to the smell of different casks, or parcels; the men who put this cask into your petitioner's cellar did not perceive any strong smell of apples; and, when it was once in the cellar, it was amongst things of smells, equally strong, such as cheese, hard fish, train-oil, &c. and, with submission, none of your Lordships can think, that the smell of apples could be then distinguished. Your petitioner was not at home when this cask was put into his cellar, and, when he came and found it there, he saw that it was marked "Dry-ware," so could be in no danger of spoiling; and at any rate, he knew his business to be precisely that of a *custodiar*; and that, if he should exceed the bounds of his known duty, and take upon him to seek out the owner, he would probably get no thanks, as it was incumbent on him, merely to keep the goods in safe custody: he was not, (to use My Lord Bankton's words,) "*To begin any new business*;" for he could not say, that, "*on his account, another abstained*." On the contrary, he had reason to expect every hour a call from the owner of the goods to deliver them, and, if he had laid out any money in enquiring for the owner, he might very readily and properly be told, "What had you to do with this? I was to send for my goods when it was most convenient for me: my bill of loading, or my receipt from the Captain, informed me that such goods were shipped on board such a vessel, and, by going to the ship-book, I could see in whose custody the goods were deposited, and would find them, for certain, in your cellar. What business then, had you,

“you, the *custodiar*, to be at this expence? If you have thrown away money idly, I know better than to pay you it: this will teach you to be less officious, and to confine yourself to your own business in time coming.”

The petitioner's own business, however much it may be at present endangered, by your Lordships interlocutor, he does hold to be a very useful one, and such, as he flatters himself, your Lordships will, upon more mature consideration, and a fuller state of the case, be disposed to protect. Your petitioner's business is a link in the chain of commerce: he is placed between the masters of vessels, and those for whom goods are brought. Your Lordships were all of opinion, that masters of vessels are bound to do no more than to carry goods safely to their destined port. When the vessels arrive, they must be unloaded, and, as the different owners of goods cannot all be upon the spot, to receive and carry away what belongs to them, and pay the master the freight, in security of which he is intitled to hold the goods, it is therefore necessary that there should be some persons, to whom such goods as are not called for by the owners, may be consigned. Your petitioner is one of those; and he will be pardoned to say, that they are most useful persons, both to the ship-masters and owners of goods, as they are *custodiar*s for both.

But should your Lordships judgment against your petitioner be affirmed, no factor will henceforth venture to take the custody of any goods, of which he does not know the owner; and, as your Lordships have found, according to the established practice in maritime business, that a ship-master is bound only to carry goods to their destined port, if there shall be no factors or *custodiar*s, whose business it is to take the charge of goods, till the owners are ready to receive them, the consequence must be, that, as the ship must be cleared out, many parcels must be thrown upon the Quay, or otherways lost or destroyed; and, if the people will not come to receive their goods, or will not allow *custodiar*s to receive their goods for them, it is not the Captain's fault, he has done his duty. Perhaps, your petitioner may be thought to argue his cause with too much confidence; but he fairly owns, that his constant
C practice

practice for thirty years, has made such an impression upon his mind, of the absolute necessity of factors or *custodians*, such as he is, that commerce appears to him to be inextricable without them; and he humbly wishes, that, before this judgment is made final, any other system which would answer the purpose were pointed out.

Mr. Ogilvie has argued, that goods, which have been consigned to a factor, as his cask was, are to be considered like strayed cattle, or waif goods of any kind, which may come into a person's possession. But the petitioner hopes to satisfy your Lordships, that no two things in the world can be more different. Strayed cattle, or waif goods, are what have been lost by the owner, and which he knows not, how, or where to find; whereas goods, which are put into the custody of a factor, are what the owner knows where to find, or may know directly, by taking the usual method of enquiry. In the former case, the law justly requires the persons, into whose possession the strayed cattle, or waif goods, have come, to do every thing in his power to discover the owners, because the owners have no way to discover him. But, in the latter case, as it has been shown to your Lordships, that the owner does or may know where they are, there is nothing more incumbent on the factor than to keep them safe, till he calls or sends for them.

And this distinction will effectually obviate a kind of general alarm, which the pursuer has sounded against the established business of a factor, as explained by your petitioner, alledging, "That it opens a noble field for those who want to lay hold of other peoples goods; that, under the pretence of being a factor, a man may, when ships arrive, take possession of what goods he likes best, and keep them carefully concealed in his cellar; that he has great odds on his side that they never shall be found out; that, if he is detected, his answer is, that he took them to stand in his cellar, till they were called for; and, if they are not found out, then they are his own;" for your Lordships will please observe, that the duty of the ship-master, and that of the factor, must both enter into consideration, when the safety of goods is the point in view. The ship-master must, at his peril, take care that goods are not delivered to an unknown factor, because his receipt or bill of lading stands for them. The factor's cellar is as easily found as the ship, or any other place where the goods could be

be lodged; they must, of necessity, be lodged somewhere; nor has the factor a better opportunity of concealing them, than the ship-master has, because the one, as well as the other, is obliged to produce the goods, when called for, by a person properly authorised.

Mr. Ogilvie's cask of apples was in a very particular situation; for, it appears by the oath which he emitted before the sheriff, that his brother had neglected to apprise him of the present being sent, till the month of March. By his brother's neglect then, Mr. Ogilvie was, strictly speaking, not the owner of the apples during the intermediate space between December 1768, and the 26th day of March 1769, when he received the letter, informing him, that such apples were his; it is, therefore, humbly submitted to your Lordships, whether, when the person, who sent the goods, has been so slovenly, as not to take the usual precaution necessary for enabling him to whom the goods were sent, in conformity with the established rules, to obtain them, a factor should be found liable for not having exerted extraordinary diligence, to make up for a neglect in the person who sent the goods, which neglect the factor could not possibly divine: for, how could he pitch upon this particular cask, addressed, "To William Ogilvie, Esquire," as an exception to the general rule, and conclude, that the gentleman, whoever he was, had no notice given him by his correspondent in London, that such a cask was sent.

And it is material for your Lordships to attend to this circumstance, that, till the month of March 1769, Mr. Ogilvie had actually no title to claim the cask in question. He could not have positively said, that he was the William Ogilvie, Esq; for whom the cask was intended; for, had he appeared at the petitioner's cellar, and alledged, that the cask was his, he could produce no written document to prove it, without which, a factor does not think himself in safety to deliver up goods. Mr. Ogilvie would have made but a foolish figure, if it had been put to him, to give an account of himself, and show, that he was the William Ogilvie, Esq; for whom the cask was intended, and he had been forced to acknowledge, that indeed the cask might be for him, but that he had no notice or information whatever, that it was.

In short, your petitioner, with great submission, cannot help thinking, that, whether this cause shall be judged upon its own peculiar

peculiar circumstances, or upon the general principle, which he has humbly endeavoured to illustrate to your Lordships, no blame can lie upon him, and he must, therefore, be assolized.

But, at any rate, as the case is altogether new, and it is clear, that your petitioner acted *optima fide*, according to the uniform practice of those of his business, though your Lordships should incline to authorise a different practice, he humbly pleads, that he ought not to be found liable in any expence; whereas, at present, he is loaded with the expence of extract in this court, though the half, or rather two thirds of the proceedings relate to the question with Mr. Rofs, whom your Lordships have assolized.

MAY it therefore please your Lordships, to alter your former interlocutor, in so far as it respects the petitioner, and assolzie him; and, at any rate, to find, that he is liable in no expence; or give such other relief, as to your Lordships shall seem meet.

According to justice, &c.

JAMES BOSWELL,

